SUPREME COURT OF THE UNITED STATES

No. 1093.—October Term, 1969

United States, Appellant, *v.* Phillipsburg National Bank and Trust Company et al.	On Appeal From the United States District Court for the District of New Jersey.

[June 29, 1970]

Mr. Justice Harlan, with whom The Chief Justice joins, concurring in part and dissenting in part.

My first reaction to this case, from the vantage point of what is depicted in the record and briefs, was wonderment that the Department of Justice had bothered to sue. How could that agency of government, I asked myself, be efficiently allocating its own scarce resources if it chose to attack a merger between two banks as small as those involved in this case? When compared with any of the 10 prior cases in which a bank merger was contested, the total assets of the bank that would result from this merger are minuscule.[1] Moreover, measured by trust

[1] The Appendix (p. 831) contains the following table showing the total assets of the resulting banks in the contested bank merger cases initiated up to the time of suit in this case.

CONTESTED SECTION 7 BANK MERGER CASES: ASSETS AND MARKET SHARES OF RESULTING BANKS

Case	*Assets (in millions)*
1. Manufacturers Hanover	$6,001.8
2. Continental Illinois	3,248.3
3. Crocker-Citizens	3,217.4
4. California Bank—First Western	2,421.2
5. Philadelphia National Bank	1,805.3
6. Provident—Central Penn	1,069.1
7. First City—Southern National (Houston)	1,042.9
8. Mercantile Trust—Security Trust	1,040.4
9. Third National—Nashville Bank & Trust	428.2
10. First National—Cooke Trust Company	389.7
11. Phillipsburg National—Second National	41.1

assets, the Phillipsburg National Bank in 1968 ranked 1346th and the Second National Bank of Phillipsburg 2429th out of the approximately 3100 banks with trust powers in the United States. If the two banks were merged, the resulting bank would have ranked 1323d—only 23 places ahead of the Phillipsburg National alone.[2] With tigers still at large in our competitive jungle, why should the Department be taking aim at such small game?

The Court's disposition of this case provides justification enough *from the Department's point of view.* After today's opinion the legality of every merger of two directly competing banks—no matter how small—is placed in doubt if a court, through what has become an exercise in "antitrust numerology," *United States* v. *First National Bank & Trust Co. of Lexington,* 376 U. S. 665, 673 (1964) (HARLAN, J., dissenting), concludes that the merger "produces a firm controlling an undue percentage share of the relevant market," *ante,* at 13.

I

Under the Bank Merger Act it is now settled that a court must engage in a two-step process in order to decide whether a proposed merger passes muster. First, the effect of the merger upon competition must be evaluated, applying the standards under § 7 of the Clayton Act, *United States* v. *Third National Bank in Nashville,* 390 U. S. 171, 181–183 (1968). If there would be a violation, the court must then proceed to decide whether "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."[3]

---

[2] App. 840.

[3] Bank Merger Act of 1966, amending § 18 (c)(5)(B) of the Federal Deposit Insurance Act, 12 U. S. C. § 1828 (c)(5)(B) (1964 ed. Supp. IV). I do not quarrel with the Court's conclusion that

For the first stage of the analysis, the Court appears to decide whether the effect of this proposed merger "may be substantially to lessen competition" by the following process: First, the Court defines the relevant product market as commercial banking. Second, it defines the geographic market as Phillipsburg-Easton.[4] The Court next calculates the percentage share of this market that would be held by the proposed merged bank,[5] and the resulting changes in "concentration," as measured by the percent of market held by the two largest[6] and three largest banks.[7] It appears that from the magnitude of these figures alone, the Court concludes that the proposed merger would "significantly increase commercial banking

---

the District Court improperly analyzed "convenience and needs," in the second stage, because of its erroneous choice of Phillipsburg alone as the relevant "community."

[4] I accept the Court's conclusion that the appropriate geographic market here is the Phillipsburg-Easton area, and agree that the geographic market designated by the District Court was too broad, given the small size of the banks involved in this case.

[5] PERCENTAGE OF PHILLIPSBURG-EASTON MARKET HELD BY MERGED BANKS

Bank Assets	19.3
Total Deposits	23.4
Total Loans	27.3

[6] PERCENTAGE OF PHILLIPSBURG-EASTON MARKET HELD BY TWO LARGEST BANKS

	Before	*After*	*Change*
Bank Assets	49	55	6
Total Deposits	56	65	9
Total Loans	49	63	14

[7] PERCENTAGE OF PHILLIPSBURG-EASTON MARKET HELD BY THREE LARGEST BANKS

	Before	*After*	*Change*
Bank Assets	60	68	8
Total Deposits	70	80	10
Total Loans	64	76	12

concentration" in an "already concentrated" market.[8] On the basis of the magnitude of these figures alone the Court concludes that this merger would violate § 7 of the Clayton Act.

I have voiced my disagreement before, particularly in the banking field, to the " 'numbers game' test for determining Clayton Act violations," *United States* v. *Third National Bank, supra,* at 193; (HARLAN, J., concurring in part and dissenting in part); see *United States* v. *First Nat. Bank, supra,* at 673 (HARLAN, J., dissenting). Although I consider myself bound by the Court's decision

---

[8] It is significant to note that the percentage figures in this case are themselves *smaller,* on the whole, than those found either in the *Philadelphia Bank* case *supra,* or *Third National Bank* case, *supra.*

PERCENTAGE OF TOTAL ASSETS IN RELEVANT MARKET HELD BY MERGED BANKS

This case		19.3
Third Nat. Bank		38.4
Philadelphia Bank	(at least 30%)	36*

PERCENTAGE OF TOTAL ASSETS IN RELEVANT MARKET HELD BY TWO LARGEST BANKS

	Before	*After*
This case	49	55
Third Nat. Bank	72	77
Philadelphia Bank	44	59

PERCENTAGE OF TOTAL ASSETS IN RELEVANT MARKET HELD BY THREE LARGEST BANKS**

	Before	*After*
This case	60	68
Third Nat. Bank	93	98

*For purposes of its holding in *Philadelphia Bank,* the Court "shade[d]" the 36% figure downward to "at least 30%" to compensate for the approximate nature of certain assumptions implicit in the manner in which it calculated the market shares, see *Philadelphia Bank, supra,* at 364 n. 40.

**Because *Philadelphia Bank* involved a merger between the second and third largest banks, the percentage held by the three largest was not used in that case.

in *Philadelphia Bank*, see *United States* v. *Third National Bank*, *supra*, at 193, I cannot concur in the simplistic way in which the Court applies the numbers test here.

Philadelphia Bank did not hold that all bank mergers resulting in an "undue percentage share of a relevant market" and "in a significant increase in the concentration of firms in that market," *id.*, at 363, *necessarily* violated § 7 of the Clayton Act. Instead that case established a rule by which the percentage figures alone do no more than "raise an inference," *id.* at 365, that the merger will significantly lessen competition. *Philadelphia Bank* left room, however, for the merging companies to show that the "merger is not likely to have such anti-competitive effects," *id.*, at 363. In short, under the *Philadelphia Bank* test, the percentage figures create a rebuttable presumption of illegality.

In this case there are two aspects of market structure, each largely ignored by the Court, that I think might well rebut the presumption raised by the percentage figures that the merger will have a significant effect on competition. Consequently, I think the defendants should on remand be given an opportunity to show by "clear evidence" that despite the percentage figures, the anticompetitive effects of this merger are not significant.

II

The first of these aspects of the market structure concerns "entry." The percentage figures alone tell nothing about the conditions of entry in a particular market. New entry can, of course, quickly alleviate "undue" concentration. And the possibility of entry can act as a substantial check on the market power of existing competitors.

Entry into banking is not simply governed by free market conditions, of course, for it is also limited by reg-

ulatory laws. When the complaint in this case was filed, entry into the Easton-Phillipsburg market was very much restricted by both the Pennsylvania and New Jersey banking statutes.[9] However, a recent change in the New Jersey statute [10] together with a new opinion of the Court of Appeals for the Third Circuit rendered since the trial in this case,[11] appear to increase considerably the possibility of new entry into Phillipsburg. For the first time it may be possible for any national bank already operating anywhere in the northern region of New Jersey to open, under certain circumstances, a new office in Phillipsburg.[12]

If one assumes the regulatory barriers to entry have been permanently lowered, it would seem that the competitive significance of this merger may well be con-

---

[9] New Jersey, at the time suit was filed here, (1) prohibited the merger of banks located in different counties; (2) restricted branch banking to the county in which the parent bank was located; (3) precluded branching altogether into cities in which another bank had a "principal office" (*i. e.*, home office), or into communities in which a bank or branch was already located. See N. J. Stat. Ann. § 17:9A–19 (B) (1963).

[10] On July 17, 1969, a new banking statute came into effect that regulates, not on the basis of counties, but instead on the basis of three banking districts, of which Phillipsburg is in the first. District-wide *de novo* branching and mergers are authorized, subject to a "principal office" protections provision, N. J. Stat. Ann. § 17:9A-19 (B)(3) (Supp. 1970).

[11] *Ramapo Bank* v. *Prospect National Bank*, — F. 2d — (C. A. 3d Cir. 1970). I intimate, of course, no views concerning the correctness of this decision.

[12] Because Phillipsburg is the location of a home office, the home-office protection proviso might be thought to preclude *de novo* branching there. However, the *Ramapo Bank* decision of the Third Circuit, *supra*, held that a national bank, by moving its main office into a protected community while simultaneously reopening its former main office as a branch, could avoid the operation of the "home-office protection" proviso of the New Jersey law. Under *Ramapo*, therefore, it is possible for any national bank willing to shift its "home-office" to Phillipsburg to enter that market.

siderably overstated by the percentage figures alone. Certainly new entry into the market involved in this case would be both easier and of much greater competitive significance than in the *Philadelphia Bank* market. In a market dominated by banks of enormous absolute size, with assets of hundreds of millions and even billions of dollars, it is of course unlikely that a new entrant will quickly become a substantial competitive force. The same is not true, however, of a market in which the largest competitor is, in absolute terms, rather small.

In short, I think the significance of the percentage figures recited in the Court's opinion can only be fully evaluated after consideration of the present entry conditions in the Easton-Phillipsburg area. Because of the new developments in the New Jersey regulation of banking that have occurred since the trial of this case, I think it inexcusable of the majority not to give the appellee banks an opportunity on remand to demonstrate whether there is now a substantial possibility of new entry, and if so, what effect that possibility had on the market power of the combined bank.[13]

III

Quite apart from entry, there is another aspect of the market structure relevant here that affects the significance of the percentage figures cited by the Court. Relying on *Philadelphia Bank*, the Court concludes that

[13] It is simply untenable for the majority to ignore the bearing of this issue on the "anticompetitive effect" of this merger on the ground that "[n]othing in the present record suggests that any national bank presently located outside of Phillipsburg will apply to move its main office to that city," *ante* —. At the time the present record was developed, existing law rendered that inquiry irrelevant. Moreover, the District Court found, quite apart from entry, that the proposed merger had no significant anticompetitive effect. It is therefore quite inappropriate for the majority to suggest that the failure of the District Court to reopen the record in light of its *Ramapo* decision is of any significance.

the "cluster of products . . . and services denoted by the term 'commercial banking' . . . composes a distinct line of commerce" for purposes of this case. The Court eschews all analysis of the *composition* of the products and services offered by appellee banks, however. The Court thus manages to ignore completely the extent to which competition from savings and loan companies, mutual savings banks, and other financial institutions that are not commercial banks affects the market power of the appellee banks.

A closer analysis of what the merging banks here do, plainly shows that they have more in common with savings and loan institutions and mutual savings banks than with the big city commercial banks considered in *Philadelphia Bank*. In particular, a much higher percentage of the total deposits of the banks here comes from savings accounts as opposed to demand deposits than is true of big city commercial banks.[14] Moreover, a much larger proportion of the total loans of these small banks is in the form of real estate or personal loans as opposed to commercial loans.[15] Savings and

---

[14] TIME AND SAVINGS DEPOSITS AND DEMAND DEPOSITS AS PERCENTAGE OF TOTAL DEPOSITS

	Time & Saving	*Demand*
PNB	71	29
SNB	72	28
Large Bank Average*	45	55

*The average for 341 banks with assets over $100 million which submit weekly reports to the Federal Reserve.

Calculated from App. 788.

[15] REAL ESTATE LOANS AND PERSONAL LOANS AS PERCENTAGE OF TOTAL LOANS

	Real Estate	*Personal*	*Combined*
PNB	54	28	82
SNB	72	14	86
Large Bank Average*	14	8	22

*See n. 14, *supra*.

Calculated from App. 788.

loan companies, savings banks, credit unions, etc., are of much greater competitive significance in this market than in the market analyzed in *Philadelphia Bank*. For in this market, these nonbank financial institutions offer close substitutes for the products and services that are most important to the appellee banks.

In choosing its product market, the Court largely ignores these subtleties and instead emphasizes the *cluster* of services and products which in the Court's words "makes commercial banking a distinct line of commerce." Because the Court does not explain why that combination has any substantial synergistic effect, cf. *Anderson's-Black Rock, Inc.* v. *Pavement Salvage Co., Inc.*, 396 U. S. 57, 61 (1969), the Court's choice of a product market here can be seriously questioned. Certainly a more discriminating conclusion concerning the antitrust implication of this merger could be made if separate concentration percentages were calculated for each of the important products and services provided by appellee banks, and then an over-all appraisal made of the effect of this merger on competition.

In any event, even assuming that for purposes of a preliminary analysis one were to use commercial banking as the line of commerce for the antitrust analysis—if only for the sake of convenience—that does not excuse the majority's failure to consider the competitive realities of the case in appraising the *significance* of the concentration percentages thus calculated, see *United States* v. *First Nat. Bank of Maryland*, 310 F. Supp. 157, 175 (D. C. Md. 1970). The bare percentages *themselves* are not affected by the presence or absence of significant competition for important bank products or services from firms outside commercial banking. By treating these percentages as no different from those found in *Philadelphia Bank*, the Court blithely assumes that percentages of the same order of magnitude represent the same

degree of market power, irrespective of the amount of competition from neighboring markets.

Seen another way, the Court's mode of analysis makes too much turn on the all-or-nothing determination that the relevant product market either includes or does not include products and services of savings and loans companies, and other competition. A far better approach would be to recognize the fact that a product or geographic market is at best an approximation—necessary to calculate some percentage figures. In evaluating such figures, however, a court should not decide the case simply by the magnitude of the numbers alone—it should give the appellees on remand an opportunity to demonstrate that the numbers here significantly "overstate" the competitive effects of this merger because of the approximate nature of the assumptions underlying the Court's definition of the relevant market.

In short, I think that this case should be remanded to the District Court so that it might re-evaluate whether, in light of the entry conditions and existing competition from savings and loans and similar financial institutions, the merger can fairly be said to threaten a substantial loss of competition in the Phillipsburg-Easton area. Cf. *White Motor Co.* v. *United States*, 372 U. S. 253 (1963). If the District Court concludes that the merger would so threaten competition, it should then, in the manner the Court's opinion suggests, proceed to decide whether there are countervailing public interest advantages.